Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	MM DOCKET NO. 95-154
	)	
CONTEMPORARY MEDIA, INC.	)	
	)	
Licensee of Stations WBOW, WZZQ, and WZZQ-FM, Terre Haute, Indiana	)	
	)	
Order to Show Cause Why the Licenses for Stations WBOW, WZZQ, and WZZQ-FM, Terre Haute, Indiana, Should Not Be Revoked	)	
	)	
CONTEMPORARY BROADCASTING, INC.	)	
	)	
Licensee of Station KFMZ(FM), Columbia Missouri, and Permittee of Station KAAM-FM, Huntsville, Missouri (unbuilt)	)	
	)	
Order to Show Cause Why the Authorizations for Stations KFMZ(FM), Columbia, Missouri, and KAAM-FM, Huntsville, Missouri, Should Not Be Revoked	)	
	)	
LAKE BROADCASTING, INC.	)	
	)	
Licensee of Station KBMX(FM), Eldon, Missouri and Permittee of Station KFXE(FM), Cuba, Missouri (unbuilt)	)	
	)	
Order to Show Cause Why the Authorizations for Stations KBMX(FM), Eldon, Missouri, and KFXE(FM), Cuba, Missouri, Should Not Be Revoked	)	
	)	
LAKE BROADCASTING, INC.	)	File No. BPH-921112MH
	)	
For a Construction Permit for New FM Station on Channel 244A at Bourbon, Missouri	)	

To: The Commission

LICENSEES' EXCEPTIONS AND BRIEF

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SUMMARY

In this Brief, Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc. (together, the "Licensees") except to the Initial Decision ("I.D."), which recommends that the maximum sanction of revocation be imposed on the Licensees' five AM and FM radio station licenses and two FM construction permits in five communities located in small-to-medium markets in Indiana and Missouri.

For as long as 30 years, the Licensees have owned and operated the subject stations with virtually an unblemished record and in the public interest. The I.D., however, concludes that license revocation is warranted because of the felony convictions of the Licensees' primary principal, Michael Rice, for sexual misconduct and because of the Licensees' alleged misrepresentations and lack of candor in certain reports concerning Mr. Rice's post-arrest status that were filed with the Commission.

Under Section 312 of the Communications Act of 1934, as amended, the Mass Media Bureau ("Bureau") must prove by a preponderance of the evidence that license revocation is warranted, but, as will be demonstrated herein, the Bureau has failed to meet its burden in this case. Moreover, this appeal challenges the validity of the Commission's 1986 and 1990 Character Policy Statements pursuant to which licenses may be revoked because of non-FCC-related felonious misconduct of a licensee's principals. We submit that this policy is unlawful where, as here: a) there is no nexus between Mr. Rice's sexual misconduct and the Licensees' broadcast activities; and b) such sexual misconduct has no relationship to the Licensees' propensity to be truthful and compliant with the Commission's rules and policies. While judicial precedent fully supports this point, the I.D. refused to address it. Equally important, the I.D.'s

conclusion that the Licensees misrepresented facts and lacked candor in reports filed with the Commission is also erroneous and should be reversed.

While we recognize that the Commission must give consideration to the findings and conclusions of the Presiding ALJ, it is nevertheless the Commission's statutory responsibility to draw its own inferences and reach its own conclusions on the designated issues from the entire evidentiary record. When such an impartial and independent de novo analysis is undertaken in this proceeding, we submit that the I.D.'s errors are patent and the subject licenses should not be revoked.

In any event, the I.D.'s Draconian sanction violates the 8th Amendment to the Constitution and applicable judicial precedent, apart from disrupting the lives of nearly 60 innocent employees and imposing a multi-million dollar loss on the Licensees. Assuming arguendo that the Commission feels compelled to sustain the I.D.'s findings, revocation of all of the licenses and permits held by the Licensees is wholly unjustified when a much less severe sanction would suffice.

LICENSEES' EXCEPTIONS AND BRIEF

I. PRELIMINARY STATEMENT

1. Contemporary Media, Inc. ("CMI"), Contemporary Broadcasting, Inc. ("CBI") and Lake Broadcasting, Inc. ("LBI," and together with CMI and CBI, the "Licensees") except to the Initial Decision, FCC 97D-09, released August 21, 1997 ("I.D.") of Administrative Law Judge Arthur Steinberg ("ALJ"), which recommends that the maximum sanction of license revocation be imposed on the Licensees, which own five radio stations and two construction permits in small-to-medium markets in Indiana and Missouri. For as long as 30 years, the Licensees have owned and operated the subject stations which even the I.D. concedes have been operated with virtually an unblemished record and in the public interest.

2. The I.D., however, concludes that license revocation is warranted because of the felony convictions of the Licensees' primary principal, Michael Rice, for sexual misconduct and because of the Licensees' alleged misrepresentations and lack of candor in certain reports concerning Mr. Rice's post-arrest status that were filed with the Commission. Under Section 312 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §312, the Mass Media Bureau ("Bureau") must prove by a preponderance of the evidence that license revocation is warranted, but, as will be demonstrated below, the Bureau has failed to meet its burden in this case.

3. The crux of this appeal challenges the validity of the Commission's 1986 and 1990 Character Policy Statements[1/] pursuant to which licenses may be revoked because of non-FCC-related felonious misconduct of a licensee's principal. This policy, we submit, is unlawful where, as here: a) there is no nexus between Mr. Rice's sexual misconduct and the Licensees'

[1/] See Character Policy Statement, ("CPS-1"), 102 FCC 2d 1179 (1986), recon. granted in part, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. National Ass'n for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987); and Policy Statement and Order ("CPS-2"), 5 FCC Rcd 3252 (1990), recon. granted in part, 6 FCC Rcd 3448 (1991), partial stay granted, 6 FCC Rcd 4787 (1991), errata, 6 FCC Rcd 5017 (1991), recon. granted in part, 7 FCC Rcd 6564 (1992). CPS-1 and CPS-2, together, shall be referred to herein as "CPS-1&2".

broadcast activities, and b) such sexual misconduct has no bearing on the Licensees' propensity to be truthful and compliant with the Commission's rules and policies. While judicial precedent fully supports such a nexus requirement, the I.D. refused to address this subject. Equally important, the I.D.'s conclusion that the Licensees misrepresented facts and lacked candor in reports filed with the Commission is also erroneous and should be reversed.

4. While we recognize that the Commission must consider the findings and conclusions of the ALJ, it is nevertheless the agency's statutory responsibility to draw its own inferences and reach its own conclusions on the designated issues from the entire record below. When such an impartial and independent de novo analysis is undertaken herein, we submit that the I.D.'s errors are patent and the subject licenses should not be revoked.

5. In any event, the I.D.'s Draconian sanction violates the 8th Amendment to the Constitution and applicable judicial precedent, apart from disrupting the lives of nearly 60 innocent employees and imposing a multi-million dollar loss on the Licensees. Assuming arguendo that the Commission feels compelled to sustain the I.D.'s findings, revocation of all five broadcast licenses and two construction permits held by the Licensees is wholly unjustified when a much less severe sanction would suffice.

II. QUESTIONS OF LAW PRESENTED

6. The following questions of law are presented:

A. Whether CPS-1&2 are arbitrary, capricious, and unlawful as applied herein when there is no relationship between Mr. Rice's felonious misconduct and the Licensees' broadcast operations, their compliance with Commission rules and policies, or their propensity to be truthful with the Commission;

B. Whether Mr. Rice's criminal convictions so adversely affect the Licensees' basic qualifications to warrant revocation of all of their licenses and construction permits;

C. Whether the Licensees intentionally lacked candor or deliberately misrepresented facts to the Commission concerning Mr. Rice's exclusion from management and policy roles at the Licensees' stations, warranting revocation of their licenses and construction permits; and

D. Whether revocation of all the Licensees' licenses and construction permits violates the Excessive Fines Clause of the Eighth Amendment.

III. ARGUMENT

A. CPS-1&2 Are Arbitrary, Capricious, And Unlawful As Applied To The Licensees

7. The first designated issue ("Issue 1") in the Order to Show Cause ("OSC") herein, 10 FCC Rcd 13685 (1995), inquires whether the basic qualifications of the Licensees to remain licensees are adversely affected by Mr. Rice's felony conviction for deviate sexual assault and sodomy involving teenagers. The answer, contrary to the I.D., clearly is "No".

8. An analysis of the Commission's policies concerning the consequences of felonious misconduct on a licensee's character qualifications reveals that in CPS-1, the Commission determined that it would only penalize an FCC licensee, permittee, or applicant for felony convictions involving false statements or dishonesty (e.g., perjury, criminal fraud, and embezzlement). The underlying rationale was that such convictions are relevant to predicting the propensity of an applicant to be truthful and reliable in its dealings with the Commission. 102 FCC 2d at 1196. However, the Commission also said that felony convictions not involving fraudulent conduct might be relevant if there is a "substantial relationship between the criminal conviction and the applicant's proclivity to be truthful or comply with the Commission's rules and policies." Id. at 1197. In addition, CPS-1 announced a new policy of automatically equating the character qualifications of licensee corporations with those of their principals. Id. at 1218.

9. CPS-2 significantly broadened CPS-1 by holding that evidence of any felony conviction was relevant in evaluating a licensee's character (5 FCC Rcd at 3252), but that not all such convictions are equally probative of an applicant's propensity to be truthful and to conform to FCC rules and policies. 5 FCC Rcd at 3252 ¶4. And, the Commission emphasized

that the mitigating factors specified in CPS-1 must still be considered in each case involving a felony conviction.[2/] 5 FCC Rcd at 3252 ¶5.

10. The Licensees established below the arbitrary and capricious nature of CPS-1&2 in its application to the Licensees, but the Presiding ALJ concluded (I.D. at n. 19) that he lacked authority to rule on such matters. Thus, it is now incumbent upon the Commission to adjudicate the merits of the Licensees' arguments.

11. Importantly, in CPS-2, when the Commission expanded the scope of the kinds of felonies it deemed relevant to character evaluations of licensees, it provided a wholly inadequate explanation for doing so. Merely stating that it is neither appropriate nor necessary to establish a "hierarchy" of felonies, and that "all felonies are serious crimes" (5 FCC Rcd at 3252) does not provide any meaningful guidance as to precisely how a felony unrelated either to a broadcast licensee's station operations or to dishonesty is relevant to a licensee's character.[3/] For the Commission to simply presume that all felonies, regardless of their underlying nature or the conduct involved, automatically affect a licensee's operations or propensity for reliability in its dealings with the agency is arbitrary, as the facts herein show. Indeed, the holding of Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992), quoting Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38-39 (D.C. Cir. 1974), is on point -- "[a]n agency relying on a previously adopted

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[2/] Such mitigating factors are (1) willfulness of the misconduct; (2) its frequency; (3) its recentness; (4) its seriousness; (5) nature of any participation of managers and owners in misconduct; (6) efforts to remedy the wrong; (7) the licensee's record of compliance with the Commission's rules and policies; and (8) rehabilitation, which includes: (a) whether the applicant has been involved in any significant wrongdoing since the misconduct occurred; (b) how much time has elapsed since the misconduct; (c) the applicant's reputation for good character in the community; and (d) meaningful measures to prevent the future occurrence of misconduct. CPS-1, 102 FCC 2d at 1227-28; CPS-2, 5 FCC Rcd at 3252 and 3254 n.4.

[3/] Similarly, neither in CPS-1&2 nor thereafter has the Commission ever provided any guidance as to the weight to be given to each mitigating factor it recognizes, or a formula for determining what constitutes sufficient mitigation to overcome the potential adverse effects of a principal's felonious misconduct on a licensee's character qualifications.

policy statement rather than a rule must be ready to justify the policy 'just as if the policy statement had never been issued'". The Commission has not and cannot provide a valid justification in this case.

12. Specifically, the record herein reflects that on August 31, 1994, pursuant to a stipulated trial, Mr. Rice was convicted of 12 counts of sexual assault and sodomy with five teenagers occurring between December 1985 and October 1990. Mr. Rice was sentenced to serve concurrent terms amounting to eight years at a Missouri State Correctional Center (where he is still incarcerated). Bur. Exh. 1, pp.14-19, 21-22. Significantly, the record further reflects that Mr. Rice's sexual misconduct did not occur at the Licensees' radio stations, had no connection with the Licensees' business activities, and did not involve any station personnel or other principals of the Licensees.[4/] Lic. Exh. 1, p.14. Nor does the record reflect that any other principal of the Licensee had contemporaneous knowledge of Mr. Rice's misconduct. Moreover, during the time period in which Mr. Rice's misconduct occurred, the Licensees had a virtual spotless record of Commission compliance. Lic. Exh. 1, pp.14-15.

13. Accordingly, no relationship has been shown by the Bureau -- and in fact, there is none -- between Mr. Rice's sexual misconduct that led to his felony convictions and the Licensees' operation of their broadcast stations or their ability to operate their stations in the public interest, comply with Commission rules and policies, and be truthful with the Commission. Under these circumstances, CPS-1&2 as applied here is arbitrary and capricious, particularly since the Commission has never given a reasoned explanation underlying its basic assumptions for its policy.

[4/] The other principals of the Licensees are: Malcolm Rice, Vice President and director of CMI and CBI; and Janet Cox, Vice President, Secretary, and director of CMI and CBI, and Vice President of LBI. I.D., ¶¶5-9. In addition, Dennis Klautzer was a 20% shareholder and officer, and Kenneth Kuenzie was a 12.5% shareholder and officer of LBI from its formation in 1988 until LBI purchased their stock in March 1997. I.D., ¶¶8-9. Michael Rice now holds all of LBI's issued stock and is sole shareholder of CMI which, in turn, is the sole shareholder of CBI. I.D., ¶¶4-8.

14. In fact, two recent cases involving a licensee principal's felonious sexual misconduct unrelated to its broadcast stations (as here) reveal not only the irrationality of CPS-1&2, but also the impossibility of applying it fairly and consistently. In The Kravis Co., 11 FCC Rcd 4740 (1996), two radio stations' licenses were renewed without any apparent inquiry or even a discussion of the fact that the licensee's president and sole stockholder pled guilty to the felonies of possessing and exhibiting child pornography.[5/] Similarly, in Hara Broadcasting, Inc., 8 FCC Rcd 3177 (Rev. Bd. 1993), the Review Board affirmed the grant of a radio application and declined to add a disqualifying issue against the applicant/licensee whose sole principal was convicted of felonious sodomy, noting "the ALJ's unchallenged observation that the Commission has never disqualified an applicant on the basis of a crime such as [this]." 8 FCC Rcd at 3180.[6/] Plainly, similar situations cannot be treated dissimilarly. See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965). Thus, under Issue 1, the Licensees cannot be treated any more harshly for Mr. Rice's sexual misconduct than were the licensees in Kravis and Hara, and disqualification of the Licensees under Issue 1 is unlawful.

15. In addition, the Licensees' due process rights are violated by revocation based on one principal's non-broadcast-related felonious misconduct -- a critical Constitutional issue ignored by the I.D. Rather than address this important concern, the I.D. strains to factually distinguish precedential cases cited by the Licensees. But, in doing so, it disregards the controlling case law. The seminal court case for the required due process analysis here is

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[5/] Apparently, the licensee in Kravis was able to avoid a Commission hearing simply because, despite the guilty plea, its principal was adjudicated pursuant to a "deferred judgment procedure" and was placed on probation "without a judgment of guilt". See Attachment A to Licensees' Proposed Findings of Fact and Conclusions of Law. Although the I.D. found this factual distinction significant, it merely highlights the arbitrariness and irrationality of CPS-1&2 and its application herein.

[6/] The I.D. attempts to distinguish Hara from the instant case by noting that unlike this case, no additional issue existed there relating to the licensee's truthfulness before the Commission. That distinction, however, is disingenuous because it begs the sole question under Issue 1 -- whether Mr. Rice's felonious misconduct has any effect on the Licensees' basic qualifications.

Wilkett v. ICC ("Wilkett"), 710 F.2d 861 (D.C. Cir. 1983), later proceedings, 844 F.2d 867 and 857 F.2d 793 (D.C. Cir. 1988). There, the Court stated that the primary focus of a licensing inquiry by a Federal regulatory agency should be on a company's record of operations, not its principals' personal lives. The Court ruled in this Interstate Commerce Commission case that it was "unreasonable" for the agency to conclude that a company was unfit to conduct motor carrier operations solely because of the agency's view that the individual proprietor's drug and murder convictions were indicative of a predisposition on the part of the company to violate ICC rules and regulations; that the fitness of the company and its proprietor were "severable"; and, that the ICC erred in equating the two (710 F.2d at 864-865) -- the same error made by the I.D. with respect to Mr. Rice and the Licensees.

16. Until CPS-1, neither Commission nor judicial precedent presumed that the misconduct of an individual shareholder would automatically be attributed to a corporate licensee. But, the treatment of a corporation and its principals as an indivisible entity -- illustrated by CPS-1, 102 FCC 2d at 1218, that "wrongdoing by corporate managers who are also controlling stockholders will be treated as though the individuals involved were sole proprietors or partners" -- violates Wilkett and contradicts the Commission's own stated goal in CPS-1 to focus on the Commission-related propensities of licensees, rather than on the private lives of their principals. Thus, the refusal by the Bureau and the I.D. to distinguish between the conduct of the Licensees and their constituent principals in this case is plainly violative of Wilkett and unlawful.

17. Indeed, Wilkett was implicitly followed by a different ALJ and the Review Board in The Petroleum V. Nasby Corp. ("Nasby"), 9 FCC Rcd 6072 (I.D. 1994), aff'd in part and modified in part, 10 FCC Rcd 6029, recon. granted in part, 10 FCC Rcd 9964 (Rev. Bd. 1995), remanded on divestiture requirement, 11 FCC Rcd 3494 (1996), summary decision, FCC 97D-04 (ALJ March 24, 1997), wherein a corporate broadcast licensee was deemed qualified in

renewal proceedings despite felony convictions of a principal (officer, director, counsel, and 34.5% shareholder). 9 FCC Rcd at 6076 ¶32 and 10 FCC Rcd at 6032 ¶21. There, the Review Board held that where the licensee had no knowledge of, or involvement in, the principal's felonious misconduct, and the principal was not in control of the daily operation and management of the station, no inference could be drawn of a licensee's propensity to disobey Commission rules and policies, and little public purpose would be served by punishing it for the transgressions of that principal. Applying the Nasby and Wilkett reasoning here, CPS-1's presumptive equation, i.e., a corporate licensee = its majority shareholder, must be deemed arbitrary and capricious, and the Licensees should not be disqualified as a result of Mr. Rice's felonious misconduct unrelated either to the Licensees' broadcast operations, their honesty or their compliance with Commission law.

18. Finally, in this connection, the I.D. (¶154) strains to reach an erroneous conclusion that there is a nexus between Mr. Rice's sexual misconduct and the Licensees' propensity to be truthful or to comply with the FCC's rules and policies. According to the I.D., the Licensees' alleged misrepresentation and lack of candor in certain §1.65 reports filed with the Commission "was a direct result of Rice's criminal misconduct". Id. However, this is obvious and impermissible bootstrapping, in which the I.D. attempts to reach an adverse conclusion under Issue 1 by relying on its wholly separate misrepresentation/lack of candor conclusions under Issue 2, discussed in Section C, infra. CPS-1&2 clearly intended that any link between criminal misconduct and Commission truthfulness be directly related to the nature of the criminal misconduct itself -- not to whether separate Commission-related misconduct is alleged to have subsequently occurred. Reasoned decisionmaking on Issue 1 must necessarily focus on the question whether there was any direct relationship between Mr. Rice's felonious misconduct and the operation of the Licensees' radio stations -- which clearly there was not; the question of the Licensees' candor in their reports to the Commission is a totally separate inquiry under Issue 2.

Blending together the elements of the two discrete issues in this case prejudicially masks the crucial fact that the Bureau did not prove any connection between Mr. Rice's convictions and the operation of the Licensees' stations, and constitutes reversible error. Had the I.D. properly limited its focus in the manner suggested above, it would have concluded that license revocation was unwarranted under Issue 1.

B. Even If CPS-1&2 Are Deemed Lawful, Notwithstanding Mr. Rice's Felony Convictions, The Licensees Remain Qualified

19. Assuming, arguendo, that CPS-1&2 are lawful as applied to the Licensees, the Licensees except to the I.D.'s conclusion (¶¶148-53) that insufficient mitigation evidence was proffered to demonstrate that the Licensees remain qualified despite Mr. Rice's felony convictions. The I.D.'s conclusions relating to mitigation evidence (¶¶148-53) do not fairly track its findings (¶¶15-31), and the I.D. ignores or wrongly analyzes important evidence under several of the mitigation categories identified at Note 2, supra.

20. **Seriousness Of Misconduct (Mitigation Factor 4):** The I.D. (¶¶10-11, 24-25) finds that while Mr. Rice could have been sentenced to a total of 84 years in prison, he was sentenced to concurrent terms amounting to only eight years. Notwithstanding, the I.D. (¶148) erroneously accords no significance to the fact that the Missouri court clearly meted out a substantially reduced sentence, which is entitled to substantial weight in measuring the seriousness of Mr. Rice's crimes. Cf. Richard Richards, 10 FCC Rcd 3950, 3957 (Rev. Bd.1995) (a trial court's ruling that a licensee convicted of felony drug possession should not be denied federal benefits is considered mitigative of the seriousness of the felony).

21. **Participation Of Management And Owners In Misconduct (Mitigation Factor 5):** The I.D. (¶22) finds that no other officer, director, shareholder or managerial employee of the Licensees, nor any of the Licensees' stations, were in any way involved in the criminal conduct for which Mr. Rice was convicted. Importantly, however, the I.D. contains no

conclusion concerning this mitigating factor which weighs significantly in the Licensees' favor. See Nasby, supra.

22. **Licensees' Record Of FCC Compliance (Mitigation Factor 7):** The I.D. (¶16) finds that the Licensees have had an essentially unblemished compliance record since their inception (CBI - 1971; CMI - 1982; and LBI - 1988), which shows that Mr. Rice's misconduct has had absolutely no effect upon the stations' or the corporations' abilities to lawfully conduct their broadcast activities. The I.D. (¶153) correctly concludes that the Licensees have a "collective good record of compliance with the Commission's rules and policies", but erroneously concludes (id.) that this is the "lone mitigating factor in the Licensees' favor". See also Paragraph 24, infra.

23. **Rehabilitation: Subsequent Criminal Misconduct (Mitigation Factor 8a):** The Licensees except to the I.D.'s conclusion (¶150) that "very little weight" should be given to the fact that there is no evidence of any criminal misconduct by Mr. Rice subsequent to October 1990, since, according to the I.D., "the fact that Rice committed no further criminal acts while the 'spotlight' was on him is not entitled to much credit". If the I.D.'s logic were credited, a felon would never be able to demonstrate rehabilitation because his post-conviction good conduct would always be subject to the claim that it resulted from the 'spotlight' being upon him. Such reasoning clearly is faulty and plainly unfair. Thus, Mr. Rice's post-October 1990 good conduct, including his extensive in-patient and out-patient psychiatric treatment for his disorder, should carry substantially more weight than accorded by the I.D. See Paragraph 27, infra.

24. **Reputation in Community (Mitigation Factor 8c):** The I.D. (¶¶17-21) finds that the record contains the favorable written statements of four individuals who have known Mr. Rice personally and/or professionally for many years concerning Mr. Rice's character and reputation in the broadcast community. However, the I.D. contains no conclusion that this factor counts in the Licensees' favor, a conclusion which clearly is warranted by the unrebutted

record evidence. See Lic. Exh. 5. Moreover, at the hearing the Licensees proffered substantial documentary evidence (Appendices A to Lic. Exhs. 2, 3 and 4) of their stations' good standing and reputation for public service and involvement in their respective communities, which evidence was erroneously rejected on relevancy grounds. See Tr. 99-101, 105, 108.[7/] The stations' excellent records of public service and substantial community involvement clearly are relevant to the mitigation factor of community reputation, as well as to the overarching issue of whether the public interest would at all be served by revocation of the stations' licenses. Accordingly, such evidence should have been admitted into the record herein and its substantial mitigative weight in favor of the Licensees duly recognized.

25. **Measures Taken To Prevent Future Occurrence Of Misconduct (Mitigation Factor 8d):** The I.D. (¶¶26-31) correctly finds that approximately two days after Mr. Rice was formally charged in April 1991 the Licensees' respective Boards of Directors adopted resolutions providing that Mr. Rice would have no "managerial, policy, or consultative role in the affairs" of the Licensees' stations and that Vice President Janet Cox was to assume the responsibilities of Chief Executive Officer of the three corporations and supervise the managerial and policy decisions of the stations in conjunction with Malcolm Rice, Kenneth Kuenzie, and the station managers. However, the Licensees except to the I.D. conclusions (¶¶151-52) that the corporate resolutions were "largely ineffective or were ignored"; the Licensees' "attempt to isolate Rice from having any 'managerial, policy, or consultative role'...was not completely successful"; and

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[7/] The Presiding ALJ erroneously relied on Cosmopolitan Broadcasting Corp., 75 FCC 2d 423, 425, n. 3 (1980), which not only pre-dated CPS-1, but was subsequently modified thereby. See 102 FCC 2d at 1211 n.79. In CPS-1, the Commission stated only that it was "not required" to consider meritorious programming in cases of misrepresentation. Here, the ALJ failed to acknowledge that the evidence in question was expressly proffered in connection with Issue 1, not Issue 2, was indeed relevant to two CPS-1&2 mitigation factors -- community reputation and compliance with Commission rules/policies -- and should have been accepted for that purpose.

Rice was involved in at least some of the personnel and programming decisions of the Licensees' stations and engaged in other management-level activities.

26. The above conclusions erroneously imply that licensee rehabilitation could not occur unless Mr. Rice was successfully "isolated" (I.D., ¶151) from every aspect of the stations' operations, or even fired. However, in elaborating on the preventing-future-occurrence aspect of the rehabilitation criteria in CPS-2, 5 FCC Rcd at 3254 n.4, the Commission cites RKO General, Inc., 5 FCC Rcd 642, 644 (1990), which, in turn, relies upon Central Broadcasting Co., 11 FCC 259, 280-81 ¶¶6-8 (1946). In Central, the Commission treated a party principal as fully rehabilitated after five years of his interim operation of a station, the license of which had not been renewed because of his prior misconduct. Most importantly, the principal demonstrated his rehabilitation by continuing to operate the subject station in a meritorious way while competing applications were in hearing. Thus, whatever intermittent involvement Mr. Rice may have had at the Licensees' stations after his arrest (see Section C, infra.) did not violate any Commission rule or policy. Indeed, the Licensees urged at hearing (Lic. Exh. 1, pp. 10-11) that Mr. Rice's consultative work at the stations was recommended by his psychiatrist for his rehabilitation, but the I.D. erroneously failed to give the Licensees any credit for it.

27. Also in connection with other measures taken to prevent recurrence of misconduct, the Licensees except to the I.D.'s failure to find that Mr. Rice has undergone extensive in-patient and out-patient psychiatric and medical treatment for his disorders. See Lic. Exh. 1, pp. 6-7, 12. This fact should have properly been considered under the I.D.'s mitigation analysis. In the same vein, the Licensees except to the ruling in the Presiding ALJ's Memorandum Opinion and Order ("MO&O"), FCC 96M-202, released September 5, 1996, in which he refused to reopen the record to receive the text of §589.040 of the Revised Statutes of Missouri and a brochure from the Missouri Department of Corrections, Division of Offender Rehabilitative Services, which describes the Missouri Sexual Offender Program ("MOSOP"), a special

rehabilitation program in prison that Mr. Rice is required to enter and complete before his release from prison. The MO&O (¶3) erroneously holds that the proffered texts are not probative of Mr. Rice's rehabilitation because Mr. Rice has not yet participated in MOSOP. However, Mr. Rice's participation in MOSOP is mandatory and is already slated to be part of his rehabilitation. Thus, it is clearly relevant to Mr. Rice's ongoing rehabilitation and prevention of future misconduct. See Alessandro Broadcasting Co., 99 FCC 2d 1 (Rev. Bd. 1984), rev. denied, FCC 85-334 (Comm'n June 28, 1985), aff'd sub nom. New Radio Corp. v. FCC, 804 F.2d 756 (D.C. Cir. 1986), where the Commission held that the conviction for second degree murder of an applicant's controlling shareholder did not warrant either disqualification or a comparative demerit because the crime was remote in time (12 years before the Commission hearing), the individual was rehabilitated under California law, and there was no predictive nexus between his past crime and future fitness to be a Commission licensee. See 99 FCC 2d at 11 n.13. The same result should obtain here since Mr. Rice has already undergone psychiatric rehabilitative therapy and will complete a rehabilitative program prior to his release. Cf. Melody Music v. FCC, supra.

28. In sum, the Licensees maintain that their record of FCC compliance, the substantial passage of time since Mr. Rice's felonious misconduct occurred, the fact that no other principal knew of, or was involved in, such activity, the reputation of Mr. Rice and the Licensees' stations in their communities, Mr. Rice's rehabilitation, and the Licensees' remedial efforts are all substantial mitigating facts that should suffice to conclude that the Licensees' qualifications are not tainted by Mr. Rice's criminal misconduct. Consequently, there is no rational justification for license or permit revocation under Issue 1.

C. The Licensees Did Not Intentionally Misrepresent Facts Or Lack Candor With The Commission

29. Issue 2 ("Misrepresentation") in the OSC seeks to determine whether the Licensees intentionally misrepresented to the Commission the extent to which, after his arrest, Mr. Rice

was excluded from involvement in the management and decisionmaking of the Licensees' stations. The Licensees generally except to the findings (¶¶48-136) and conclusions (¶¶154-95) that the Licensees misrepresented facts and lacked candor in their reports to the Commission concerning Mr. Rice's activities. In addition, they specifically except to the following faulty conclusions in the I.D.:

(1) The Licensees filed reports with the Commission that misrepresented facts and lacked candor concerning the nature and extent of Mr. Rice's activities. Therefore, the Licensees cannot be relied upon to deal with the Commission in a fully truthful, candid, and forthright manner (¶¶154-55);

(2) The Licensees' May 14, 1992 report (Lic. Exh. 1, Appendix G-2) contained "a false statement of fact and therefore a misrepresentation" that there had been "no change" in Mr. Rice's status with CBI (¶162) "when there had indeed been a change" (¶166). That same report "concealed pertinent facts and was not fully informative or completely forthcoming with respect to the true nature and extent of the activities being undertaken by Rice on behalf of, and with the knowledge of, the Licensees," which constituted a lack of candor (¶162). What was "concealed" was the "highly significant fact that Rice began to have a consultative role in the Licensees' affairs" (¶166);

(3) In a September 30, 1994 letter to the Commission (Bur. Exh. 1, Attach. 13), the Licensees repeated their earlier statements that, since his hospitalization, Mr. Rice has been "'excluded from involvement' in the management and operations of the Licensees' stations," which was a "false statement of fact and a misrepresentation" (¶162), because, apart from consultative activities, Mr. Rice was also involved in at least some programming, personnel, and management-level activities (¶170);

(4) Since Janet Cox allowed Mr. Rice to assume a consultative role, despite a specific prohibition in Board resolutions, "[i]t is not a very large leap to conclude from the overall record in this proceeding that Rice was permitted (or assumed for himself) a managerial role as well" (¶182) and that Janet Cox and the Licensees had knowledge of, but failed to disclose, Rice's involvement in at least some programming and personnel matters and management-level activities (¶¶191, 194);

(5) The Licensees' deception was intentional (¶162), and the Licensees intended to mislead and deceive the Commission with respect to Mr. Rice's actual role in the affairs of the Licensees' stations (¶190); and

(6) The Licensees had a logical reason or motive to mislead and deceive the Commission, because if the Licensees had informed the Commission, directly and unequivocally, about Mr. Rice's changed role and his consultative and managerial activities, they would have risked a Commission inquiry or investigation that they were attempting to avert (¶192).

30. The Licensees vigorously deny that Mr. Rice's activities vis-a-vis the stations were inadequately reported to the Commission, and that the Licensees' reports contained "false" and

"uncandid" information. Yet, even if the Commission were to conclude otherwise, an ultimate determination of misrepresentation or lack of candor would also require the important additional element that any such inaccuracy was reported with an intent to deceive. See Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 ¶6 (1983). Contrary to the ALJ's speculative and unsupported conclusions, no evidence of any such intent is present herein. In other words, the Bureau has failed to meet its evidentiary burden (preponderance of the evidence) that the Licensees intentionally deceived the Commission in connection with their reporting of Mr. Rice's exclusion from the Licensees' management and decisionmaking. Hence, neither misrepresentation nor lack of candor conclusions against the Licensees are warranted and should be reversed.

1. Mr. Rice's Activities Were Adequately Reported And Did Not Contain "False" Or "Uncandid" Statements

31. Issue 2 was derived from the Licensees' initial June 14, 1991 §1.65 report to the Commission (Lic. Exh. 1, Appendix G-1) (emphasis added):

> Since Mr. Rice's hospitalization on April 3, 1991, he has had absolutely no managerial, policy, or consultative role in the affairs of the [Licensees] in which he has ownership interests and officer positions....In other words, pending a resolution of the referenced criminal charges, Mr. Rice is being completely insulated and excluded from any involvement in the managerial, policy, and day-to-day decisions involving any of the four licensed stations and three construction permits held by the [Licensees].

After Mr. Rice was released from the hospital in October 1991, his psychiatrists advised him to resume some business activities. (Lic. Exh. 1, pp. 10-11). The record establishes that in subsequent §1.65 reports, beginning in May 1992 (shortly after Mrs. Cox agreed to allow Mr. Rice to engage in occasional and isolated technical projects for the stations), the Licensees deleted the representation that Mr. Rice had no "consultative" role at the stations and substituted the following language (Lic. Exh. 1, p. 8 and Appendix G-2) (emphasis added):

> There has been no change in Mr. Rice's status with Contemporary....Mr. Rice is no longer hospitalized, but he continues to be treated by his physicians as an outpatient, and he continues to have no managerial or policy role in the affairs of the [Licensees] in which he has ownership interests and corporate positions.

The I.D. (¶¶162, 166, 168-69) hypertechnically faults the Licensees for not supplying a "clear statement" that Mr. Rice had begun limited consultative work and for stating that there was "no change" in Mr. Rice's status, when, according to the I.D., Mr. Rice's activities represented a "highly significant" change. The I.D.'s conclusions, however, are plainly wrong.

32. Section 1.65(a) of the Rules requires an applicant to file supplementary information whenever information already supplied in an application is "no longer substantially accurate and complete in all significant respects" (emphasis added). Thus, the Licensees' filings must be viewed in this context. The §1.65 reports and application exhibits, which were filed beginning in June 1991, were voluntary reports pertaining to the pre-trial stages of criminal proceedings against Mr. Rice. The submissions were updated and modified as circumstances warranted (e.g., Mr. Rice's consultative activities following his hospital release in October 1991). Lic. Exh. 1, pp. 7-8.[8/] The Licensees believed in good faith that their filings were adequate advisories, given the sporadic and temporary nature of Mr. Rice's consultative technical projects. See Lic. Exh. 1, pp. 11-12; Tr. 281-82.

33. Under these circumstances, the Licensees urge that the I.D.'s conclusion is erroneous that Mr. Rice's occasional consultative role at the Licensees' stations was so substantial and significant that it rendered the Licensees' §1.65 reports untruthful. In hindsight, while the opening phrase in the second §1.65 report quoted in Paragraph 31 above might have stated that "There has been no substantial or significant change in Mr. Rice's status," the fact that the very next sentence states that "Mr. Rice is no longer hospitalized" surely puts the reader on adequate notice that "no change" is intended to refer only to meaningful, substantive changes. Mr. Rice's occasional consultative activities did not materially change the fact that he had been

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[8/] Indeed, five months after the Licensees' May 1992 §1.65 report, §1.65(c) was amended to delete the requirement to file pre-adjudication information concerning non-FCC-related misconduct. See CPS-2, 7 FCC Rcd at 6566, ¶10. It is only because the Licensees had begun reporting in June 1991 that they continued to do so between January 1993 and August 1994.

removed from day-to-day decisionmaking at the stations and had no managerial or policy role. Manifestly, the Commission cannot revoke five radio licenses over such parsing of language when common sense and an impartial reading dictate otherwise. Consequently, the I.D.'s conclusions that the Licensees' §1.65 reports misrepresented facts or lacked candor should be reversed as unsupported by the record evidence and erroneous as a matter of law.

2. The Weight Of The Evidence Establishes That Mr. Rice's Limited Involvement In Station Activities Did Not Render The Licensees' §1.65 Reports False

34. The record contains conflicting evidence from the following six witnesses concerning the extent to which Mr. Rice discussed programming and personnel issues at the Licensees' stations after his hospitalization concluded in October 1991:

Witness	Title
Janet Cox	Licensees' Vice President and CEO (since 1991)
Richard Hauschild	General Manager, Station KFMZ(FM) (since 1991)
Daniel Leatherman	General Manager, Station KBMX(FM) (1990-96)
Kenneth Brown	General Manager, Stations WBOW, WZZQ, and WZZQ-FM (since 1993)
Leon Paul Hanks	Group Program Director (1992-94)
John Rhea	General Manager, Stations WBOW and WZZQ-FM (1991-92)

An unbiased reading of the record as a whole, however, clearly supports the conclusions that Mr. Rice relinquished whatever managerial and policymaking roles he may have had prior to his being formally charged and then hospitalized in April 1991, as the Licensees accurately represented to the Commission. Therefore, the Licensees except to the I.D.'s conclusions (¶¶170, 191, 194) that Mr. Rice was "involved" in some programming, personnel, and management-level activities after April 1991 and that the Licensees were aware of said involvement.

a) The I.D.'s Conclusions About Mr. Rice's Purported Involvement In The Licensees' Operations Are Erroneous

35. Janet Cox has functioned as the Licensees' CEO since April 1991. General Managers Richard Hauschild, Kenneth Brown (since 1993), and, until recently, Daniel Leatherman, have assisted her in managerial decisionmaking, each overseeing day-to-day

management and operation of their respective stations on a full-time basis. Lic. Exh. 1, pp. 6-13; Lic. Exh. 2, pp. 1-3; Lic. Exh. 3, pp. 2-3; Lic. Exh. 4, pp. 1-3; Tr. 136-60, 168-83, 216-22, 229-36, 261-62, 275-80, 329-41, 622. The record is uncontroverted that from April 1991, when Mr. Rice was hospitalized for psychiatric care and was excluded from the Licensees' managerial decisionmaking and consultative processes pursuant to Board resolutions, until his release some six months later, he was not involved in the Licensees' affairs or operations. Several weeks after Mr. Rice's October 1991 hospital release, upon his psychiatrist's advice, Mrs. Cox permitted him to undertake certain circumscribed technical tasks at the stations. Importantly, Mrs. Cox advised Mr. Rice that he should remain uninvolved and inactive with respect to the Licensees' management, and he agreed to do so. Lic. Exh. 1, pp. 8-11; Tr. 204-05, 209, 224-25, 328-29.

36. The record is clear that Mr. Rice did not participate in the normal oversight functions of station management following his hospital release. For example, the record reflects that Mr. Rice had no involvement in annual budget meetings, the April 1993 hiring of General Manager Kenneth Brown, the retention of David Lange as a program consultant, station sales activities or commercial policies, accounting or billing, determinations of employee salaries, negotiation of employment contracts, negotiation of the building lease for the Licensees' new corporate offices, updating the Licensees' employee policy manual, negotiation of vendor contracts or other contacts with vendors, check-writing (except on rare occasions when his signature was needed to meet banking requirements), borrowing money for the Licensees, or equipment purchases (except under Mrs. Cox's specific direction). Those functions were left strictly to Mrs. Cox's domain. Lic. Exh. 1, pp. 10, 13; Lic. Exh. 2, pp.2-3; Lic. Exh. 3, p.2; Lic. Exh. 4, pp.1-2; Tr. 216-18, 229, 232-36, 261-62, 275-80, 329-41.

37. While there was testimony that Mr. Rice made unsolicited comments to Mrs. Cox, Leon Paul Hanks, and John Rhea about certain employees' performance and music selections,

the weight of the evidence convincingly demonstrates that Mrs. Cox, as Vice President and CEO, made management decisions wholly independent of what Mr. Rice may have said -- sometimes consistent with his comments, and at other times inconsistent therewith. Tr. 216-18, 261-62. And, the testimony of Messrs. Leatherman, Brown, and Hauschild firmly supports the conclusion that they managed their respective stations without any input from Mr. Rice and reported exclusively to Mrs. Cox. Tr. 136, 142, 155-60, 168-77, 179-83, 605, 622; Lic. Exh. 2, pp. 1-3; Lic. Exh. 3, pp. 2-3; Lic. Exh. 4, pp. 1-3.[9/] Indeed, the record shows that Mr. Rice had no communications with either Mr. Brown or Mr. Hauschild concerning their station operations. Lic. Exh. 2, pp. 2-3; Lic. Exh. 4, pp. 1-3, 606, 609, 611-12, 622. To the extent Mr. Rice had communications with Mr. Leatherman (contained in six memoranda faxed between Rice and Leatherman), they were, with one exception, limited to matters solely involving Mr. Rice's interests as a landlord of the building that housed the KBMX offices and studio. The single memorandum from Mr. Rice relating to KBMX sound effects was nothing more than an inquiry, not a directive, and in response thereto, Mr. Leatherman dealt with Mrs. Cox, not Mr. Rice. Lic. Exh. 3, p. 2; Tr. 136, 156-59, 183. The bottom line is that Mrs. Cox did what she thought was best, not what Mr. Rice may have opined or suggested. Tr. 216-18, 261-62, 341; Lic. Exh. 1, p. 14. Mrs. Cox unequivocally testified that it was she who called the shots. Id.

38. In rebuttal to the direct testimony of the Licensees' witnesses, Messrs. Hanks and Rhea testified that, from time to time, Mr. Rice gave them directives concerning personnel or programming matters. But there is no record evidence that either Hanks or Rhea communicated

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[9/]This testimony of Mrs. Cox and these General Managers belies the I.D.'s erroneous finding that "[t]he only individual with personal knowledge of the disputed facts who could have rebutted the testimony of Hanks and Rhea was Rice himself." (¶176) Indeed, since Mr. Rice did not participate in the preparation of the Licensees' §1.65 reports, no negative inference can properly be drawn from his nonappearance at the hearing regarding any alleged misrepresentations within these reports. See Dow Chemical Co. (U.K.) v. S.S. Giovonella D'Amico, 297 F.Supp. 699, 701 (S.D.N.Y. 1969) (negative inference regarding absent witness limited to testimony on facts material to issue in the case). Lastly, it must also be remembered that the burden of proof on Issue 2 rested exclusively with the Bureau, not with the Licensees. See OSC at ¶22.